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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-2059

WILLIAM GEORGE BROGE, EUGENE MOBLEY,
FREDDIE WALDEN and JIM TRENT,

Petitioners,

versus

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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IN THE

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OPINIONS BELOW

The opinion of the District Court of Appeal of the State of Florida, Fourth District, which affirmed Petitioners convictions and sentences on January 8, 1974, is reported at 288 So.2d 280 (4 DCA Fla.1974)(Petitioners' Appendix A1-3). The order of April 30, 1974, denying Petitioner's Petition for Writ of Certiorari in the Supreme Court of Florida is reported at 295 So.2d 302 (Fla.1974)(Petitioners'

Appendix A4).

JURISDICTION

Petitioners, in their jurisdictional statement in the Petition for Writ of Certiorari, make no presentation of any constitutional, statutory, or court rule authorizing their present application for the issuance of the Writ of Certiorari by this Court. As Respondent will more fully develope in the argument portion of this brief, Respondent maintains that Petitioners have not demonstrated any legal authority for this Court's assumption of jurisdiction as is required by Rule 23 of the Rules of the Supreme Court of the United States. Therefore, the present application for Writ of Certiorari is legally insufficient and should be denied.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution guarantees the right of an accused to confront witnesses against him and cross-examine them. The Fourteenth Amendment of the United States Constitution imposes the Sixth Amendment upon the States.

QUESTIONS PRESENTED (RESTATED)

1. Whether the sufficiency of the evidence of guilt is a factor which an appellate court may consider in determining

whether an alleged improper prosecutor closing argument constitutes reversible error?

2. Whether an alleged improper prosecutor closing argument, per se, constitutes a violation of a defendant's right to confrontation and cross-examination in terms of the Sixth and Fourteenth Amendments of the United States Constitution justifying the assumption of jurisdiction and issuance of the Writ of Certiorari by this Court?

STATEMENT OF THE CASE

Respondent, generally accepts Petitioners' Statement of the Case insofar as it is accurate, nonargumentative, and supported by a correct reference to a portion of the State court record.

Respondent adds the additional factual matter that Petitioners have never raised in any Florida State court the United States Constitutional grounds for attack that Petitioners now present before this Court. Therefore, no Florida State court has ruled on the Constitutional challenges that Petitioners argue in their present application for issuance of a Writ of Certiorari.

ARGUMENT

From a reading of the JURISDICTION, STATEMENT OF THE CASE, and REASONS FOR ALLOWANCE OF WRIT sections of

Petitioners' Petition for Certiorari, it would appear that Petitioners assume that this Court should accept jurisdiction of this case and issue a Writ of Certiorari favorable to Petitioners merely because Petitioners claim they were deprived of their right of confrontation and cross-examination by the prosecutor's closing arguments. Respondent respectfully maintains that Petitioners' contentions are unsound and should be rejected by this Court.

Respondent points out that the issuance of the Writ of Certiorari by this Court is one of discretion. See Rule 19 of the Rules of the Supreme Court of the United States. Rule 23 of the Rules of the Supreme Court of the United States specifically requires a Petitioner to include a jurisdictional statement establishing the basis for this Court's assumption of jurisdiction. Since Petitioners have not done so, Respondent suggests that this Court should decline to assume jurisdiction and issue the discretionary Writ of Certiorari on the grounds that Petitioners have failed to comply with the Rules of this Court.

The specific constitutional challenge made in this Court to the prosecutor's closing argument is based upon a claim of violations of the Sixth Amendment of the United States Constitution right to confrontation and cross-examination. This constitutional basis for attack, as well as Petitioners' claim of an improper standard of review of an alleged violation of a

constitutional right (see Petitioners' and Respondent's respective Question No. 1), has never been raised by Petitioners in the Florida State courts. Therefore, Petitioners are precluded from belatedly raising these new grounds for the first time in this Court. See Missouri Insurance Company v. Gehner, 281 U.S. 318, 50 S.Ct. 326, 74 L.Ed. 870 (1930); Pennsylvania Railroad Company v. Illinois Brick Company, 297 U.S. 447, 56 S.Ct. 556, 80 L.Ed. 796 (1930); Capitol City Dairy Company v. Ohio ex rel. Attorney General, 183 U.S. 238, 22 S.Ct. 120, 46 L.Ed. 171 (1902); and Mercer v. Theriot, 377 U.S. 152, 84 S.Ct. 1157, 12 L.Ed.2d 206 (1964).

The issuance of a Writ of Certiorari by this Court is an act done only when the case before it clearly presents special and important reasons therefore (Rule 19 of the Rules of the Supreme Court of the United States). Respondent believes Petitioners' case is not one establishing any compelling reasons for this Court's assumption of jurisdiction and the issuance of the Writ of Certiorari. The case involves no new or claimed new principle of law nor any determination by a State court of any federal question.

It is well settled by the decisions of this Court that, in cases involving an alleged state prosecutor's improper closing argument, the burden is upon the Petitioner to clearly demonstrate that the act of the prosecutor constituted a violation of a federal constitutional right justifying Supreme Court intervention.

See Buchalter v. New York, 319 U.S. 427, 63 S.Ct. 1129, 87 L.Ed. 1492 (1943). As this Court specifically noted, the due process clause of the Fourteenth Amendment of the United States Constitution does not permit a dissatisfied criminal defendant to bring to the test in the Supreme Court of the United States every ruling made in the course of a trial in a state court. See Buchalter v. New York, supra, at page 430.

Even if this Court were to examine the alleged improper prosecutor closing arguments, what becomes patently clear is that Petitioners have merely presented, on page 3 of their Petition for Writ of Certiorari to this Court, a list of closing arguments that Petitioners dislike. Petitioners make no effort to establish, even a prima facie case, that these particular arguments, in the context of the state trial record, constitute a violation of Petitioners' Sixth and Fourteenth Amendment Constitutional rights.

In Buchalter v. New York, supra, this Court pointed out that an alleged improper prosecutor comment is not per se grounds for issuance of a Writ of Certiorari (319 U.S. at 431). This same position was recently reaffirmed by this Court in the case of Donnelly v. DeChristoforo, ___ U.S. ___, 94 S.Ct.1868, 40 L.Ed.2d 431 (1974). In the Donnelly decision, the Court stated that there is a "distinction between ordinary trial error of a prosecutor and that sort of egregious misconduct held . . . . to amount to a denial of constitutional due process."

(___ U.S. ___, 40 L.Ed.2d 439) This Court went on to hold that a petitioner must demonstrate to this Court "that an examination of the entire proceedings in the case" supports his contention that the prosecutor conduct resulted in a denial of due process (___ U.S. ___, 40 L.Ed.2d 437). It is this last quotation from the Donnelly v. De Christoforo case that requires an examination of the quantum of evidence of guilt be had as part of the entire state court proceedings in determining if any alleged prosecutor arguments resulted in prejudice or a denial of due process to a criminal defendant (contrary to Petitioners' Question 1 on page 2 of their Petition).

In the case at bar, if this Court were to examine the particular comments challenged by Petitioners in the context in which they occurred and in the total setting of the trial proceedings, as per this Court's decision in Donnelly v. DeChristoforo, supra, Respondent believes that Petitioners' position would be found to be totally without merit. First, Petitioners never challenged the quantum or quality of the evidence of guilt presented at their trial. Thus, the likelihood of a miscarriage of justice or prejudice to Petitioners as a result of any alleged improper prosecutor closing arguments is minimal. Second, an examination of the particular comments (page 3 of Petitioners' Petition) reveals that each and every comment cited by Petitioners was either proper or in direct response to the antics and arguments previously presented by Petitioners' privately retained trial counsel in his

closing argument. Thus, Petitioners are in no position to complain of the particular closing arguments of the prosecutor. See Buchalter v. New York, supra, at page 431. Third, the record of the state proceeding further reveals that the jury was thoroughly and properly instructed by the trial judge that closing arguments are not to be considered as evidence (see Respondent's Appendix 1). Finally, Respondent points out that the record reflects that the jury, irrespective of Petitioners' claims concerning the results of the challenged prosecutor closing arguments, made careful, deliberate, and specific findings as to each defendant and charge. The jurors painstakingly distinguished and weighed the evidence as to each individual defendant. Some were determined guilty of felonies, some not; some were determined guilty of misdemeanors; some not; and some were determined guilty of no offense (see Respondent's Appendix 2-11). The jury did not "rally to the flag" of any alleged prejudicial remarks that Petitioners claim the prosecutor waved in their face. If the jury had been prejudiced, they would not have made the fine distinction that they did. Therefore, even a casual view of the state court record reveals that Petitioners' conclusions concerning the legal effect of the challenged prosecutor closing argument are unsound.

CONCLUSION

Respondent respectfully maintains

that Petitioners have not demonstrated that this Court has jurisdiction to consider this case, much less issue a Writ of Certiorari. This is so because Petitioners have not alleged any constitutional, statutory, or court rule basis for invocation of this Court's jurisdiction. Petitioners have not demonstrated that the Florida state courts have denied any United States Constitutional assertions raised by Petitioners. Further, Petitioners have not demonstrated that the issues presented to this Court in their present application for Writ of Certiorari have ever been presented to the Florida state courts.

Should this Court choose to examine the alleged improper prosecutor closing arguments that Petitioners present as grounds for relief in this Court, it is abundantly clear that Petitioners have not met their burden in establishing that these particular comments, in the context of the state trial court record, constitute a violation of their Sixth and Fourteenth Amendment rights. Petitioners merely assert that the comments, per se, constitute a violation of their constitutional rights. Petitioners have not demonstrated prejudice by the particular comments because the jury may have been swayed by them where there was a close question of evidence of guilt in their case. Petitioners have not established that, as it appears from the very nature of the comments, that the particular comments were not responsive to the conduct and closing arguments of Petitioners' own privately retained trial counsel.

Finally, Petitioners have not established that there was any potential prejudice resulting from the alleged improper comments or that it was not cured by the instructions given by the trial judge concerning the weight the jury was to give as to closing argument of counsel.

Based upon the foregoing, supported by the authorities cited in the argument portion of this brief, Respondent respectfully requests that this Court decline to assume jurisdiction in this case and deny Petitioners' application for issuance of a Writ of Certiorari.

Respectfully submitted,

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State of Florida
The Capitol
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214 Pan American Building
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Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition to a Petition for Writ of Certiorari to the Supreme Court of the State of Florida has been forwarded by mail this 14th day of August, 1974, to Honorable Larry Klein, CONE, WAGNER, NUGENT, JOHNSON & McKEOWN, P.A., 507 North Olive Avenue, West Palm Beach, Florida 33402, Attorneys for Petitioners.

BASIL S. DIAMOND
Assistant Attorney General

RESPONDENT'S APPENDIX

Ladies and Gentlemen of the jury, counsel at this stage of the trial will be making their final arguments to you. Counsel in making these arguments to you will be commenting upon the testimony and evidence that you have heard and that has been presented to you in this case.

They, as you, will be recalling the evidence in the case. They will not intentionally try to mislead you, however, if their recollection of the evidence differs from what your recollection is, you must follow your own recollection.

These final arguments by counsel are not to be construed by you as evidence in the case nor instructions on the law. Nevertheless, these arguments are intended to help you understand the contentions of each side and you should give them your close attention.

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus William George Broge; Verdict: We, the jury, find the defendant William George Broge not guilty of Count One, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus William George Broge; Verdict: We, the jury, find the defendant William George Broge guilty of Riot as charged in Count Two of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus William George Broge; Verdict: We, the jury, find the defendant William George Broge guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus William George Broge; Verdict: We, the jury, find the defendant William George Broge, guilty of Riot by Destruction of Building While Unlawfully Assembled as charged in Count Four of the Information, so say we all. Dated July 22, 1971, West

Palm Beach, Florida Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, State of Florida, Case Number 70C-2046, State of Florida versus Jim Trent; Verdict: We, the jury, find the defendant Jim Trent not guilty of Count One, so say we all. Dated July 7, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

THE COURT: What was that date?

THE CLERK: July 22, 1971, Your Honor.

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Jim Trent; Verdict: We, the jury, find the defendant, Jim Trent, guilty of Riot as charged in Count Two of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Jim Trent; Verdict: We, the jury, find the defendant, Jim Trent, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record

in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Jim Trent; Verdict: We, the jury, find the defendant Jim Trent guilty of Riot by Destruction of Building While Unlawfully Assembled as charged in Count Fourt of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Harold Gordon McDade; Verdict: We, the jury, find the defendant, Harold Gordon McDade not guilty of Count Two, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Harold Gordon McDade; Verdict: We, the jury, find the defendant, Harold Gordon McDade not guilty of Count Three, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, State of Florida, Case Number 70C-2046, State of Florida versus Azell Johnson; Verdict: We, the jury, find the defendant, Azell Johnson not guilty of Count Two, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case

Number 70C-2046, State of Florida versus Azell Johnson; Verdict: We, the jury, find the defendant, Azell Johnson, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Robert Beaureguard; Verdict: We, the jury, find the defendant, Robert Beaureguard not guilty of Count Three, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Richard Arthur Trout; Verdict: We, the jury, find the defendant, Richard Arthur Trout not guilty of Count Two, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Richard Arthur Trout; Verdict: We, the jury, find the defendant Richard Arthur Trout guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record

in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Richard Arthur Trout; Verdict: We, the jury, find the defendant, Richard Arthur Trout not guilty of Count Four, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Eugene Mobley; Verdict: We, the jury, find the defendant Eugene Mobley guilty of Riot as charged in Count Two of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Eugene Mobley; Verdict: We, the jury, find the defendant Eugene Mobley, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Eugene Mobley; Verdict: We, the jury, find the defendant, Eugene Mobley, guilty of Riot by Destruction of Building While Unlawfully Assembled as charged in Count Four of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Samuel E. Glizk; Verdict: We, the jury, find the defendant, Samuel E. Glizk, not guilty of Count Two, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Samuel E. Glizk; Verdict: We, the jury, find the defendant, Samuel E. Glizk, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Preston LeGay Boyce; Verdict: We, the jury, find the defendant, Preston LeGay Boyce, not guilty of Count Two, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Preston LeGay Boyce; Verdict: We, the jury, find the defendant, Preston LeGay Boyce, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Preston LeGay Boyce; Verdict: We, the jury, find the defendant, Preston LeGay Boyce, not guilty of Count Four, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Richard Allen; Verdict: We, the jury, find the defendant, Richard Allen, not guilty of Count Two, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Richard Allen; Verdict: We, the jury, find the defendant, Richard Allen, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Freddie Jones Walden; Verdict: We, the jury, find the defendant, Freddie Jones Walden, guilty of Riot as charged in Count Two of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Freddie Jones Walden; Verdict: We, the jury, find the defendant, Freddie Jones Walden, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Freddie Jones Walden; Verdict: We, the jury, find the defendant, Freddie Jones Walden, not guilty of Count Four, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Biagio John Ferrara; Verdict: We, the jury, find the defendant Biagio John Ferrara, not guilty of Count Two, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Biagio John Ferrara; Verdict: We, the jury, find the defendant Biagio John Ferrara, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir,

Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Biagio John Ferrara; Verdict: We, the jury, find the defendant, Biagio John Ferrara, not guilty of Count Four, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Bartholomew O'Shea; Verdict: We, the jury, find the defendant Bartholomew O'Shea, guilty of Riot as charged in Count Two of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Bartholomew O'Shea; Verdict: We, the jury, find the defendant, Bartholomew O'Shea, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Bartholomew O'Shea; Verdict: We, the jury, find the defendant, Bartholomew O'Shea, not guilty of Count Four, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Lanny Stokes; Verdict: We, the jury, find the defendant Lanny Stokes, not guilty of Count Two, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Lanny Stokes; Verdict: We, the jury, find the defendant, Lanny Stokes, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Lanny Stokes, Verdict: We, the jury, find the defendant, Lanny Stokes, not guilty of Count Four, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."